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GOLDEN SUPPORT SDN BHD v. TRIBUNAL PENGURUSAN STRATA MALAYSIA & ANOR

HIGH COURT MALAYA, SEREMBAN
ABU BAKAR JAIS J
[JUDICIAL REVIEW NO: NA-25-02-01-2017]
B 22 MARCH 2019

ADMINISTRATIVE LAW: *Judicial review – Application for – Strata Management Tribunal ('Tribunal') allowed claim by management corporation for maintenance charges – Whether claim for maintenance charges barred under s. 6(1)(d) of Limitation Act 1953 – Whether running accounts – Whether caught by s. 6(1)(d) – Whether Tribunal provided grounds for award – Whether applicant established irregularity affecting award of Tribunal – Whether decision of Tribunal final and binding – Rules of Court 2012, O. 53*

D The applicant, the legal owner of 134 parking lots at KM Plaza, sued the second respondent, a management corporation incorporated under the Strata Titles Act 1985, (together with other defendants) in a separate action at the High Court because the latter applied for strata titles thinking the applicant's parking lots were common property. The High Court gave judgment for the applicant and ordered damages to be assessed, which was pending. E Subsequently, despite the High Court's decision, the second respondent filed an action at the first respondent, a tribunal established under the Strata Management Act 2013 ('SMA'), against the applicant for maintenance charges for the parking lots for 11 years, from 2004 to 2015. The applicant counterclaimed because the second respondent had wrongly rented out the F parking lots to others and wrongfully collected monies for the rentals. The first respondent decided in favour of the second respondent and dismissed the applicant's counterclaim. Hence, the application for judicial review under O. 53 of the Rules of Court 2012 by the applicant against that decision of the first respondent. The issues for the court's determination were, *inter alia*: G (i) whether the second respondent's claim at the first respondent was statute barred by s. 6(1)(d) of the Limitation Act 1953 ('LA') which permits the recovery of the sum allegedly owed within six years from the date of accrual of the cause of action; (ii) whether the first respondent provided reasons for its decision; and (iii) whether the first respondent's decision was illegal as it H contravened the principle of *sub judice* as it should have stayed the proceedings pending the assessment of damages ordered by the High Court.

Held (dismissing application):

(1) The maintenance charges were running accounts and was therefore, not caught by s. 6(1)(d) of the LA. Since the maintenance charges were not I caught by s. 6(1)(d) of the LA, there was no issue that s. 105(2) of the SMA could not be applied retrospectively and deprive the applicant's right which had purportedly accrued prior to that date by virtue of

s. 6(1)(d) of the LA. As the provisions of the LA especially s. 6(1) did not apply for the applicant, there was no issue that a written law has taken away a right already given to the applicant. (paras 12 & 14)

(2) The applicant had failed to appreciate that it could not seek refuge under s. 6(1)(d) of the LA to say that the second respondent's claim was time-barred because this statutory provision does not hinder or restrain a claim for running accounts for the maintenance charges. As such, the second respondent was allowed to claim before the first respondent for these charges. It was also incorrect for the applicant to say that the second respondent had not pleaded the claim for running account. The whole of the second respondent's claim must be viewed to appreciate that it had indeed been pleaded. (paras 15 & 17)

(3) The first respondent had provided the grounds of awards, where, the first respondent dealt with the issues and explained the reasons in giving the award, including the applicant's allegation that the first respondent had wrongly shifted the burden of proof. There was no shifting of burden as the first respondent had indeed required the second respondent to prove the maintenance charges. In essence, there was no sufficient reasons for this court not to affirm that decision of the first respondent. Even if there was a delay in giving the grounds of award, it did not mean that it was produced as an afterthought. The first respondent required time to reflect on the evidence, hear submissions, consider the same, deliver its decision before delivering the grounds of award, and therefore, the delay was expected. In any event, the delay was not too long. (paras 18 & 19)

(4) The cases before the High Court and the first respondent were not the same. In the High Court it was in respect of declaration and injunction regarding ownership of the parking lots. Whilst, before the first respondent, it was for the claim on failing to pay maintenance charges. Thus, the second respondent was not prohibited in making its claim before the first respondent despite the High Court's pending assessment for damages for the applicant. The first respondent had no jurisdiction for the claim of the applicant at the High Court then but was well within jurisdiction for the second respondent's claim for maintenance charges. As such, the first respondent need not stay the proceedings for the assessment of damages to be completed at the High Court. (para 20)

(5) It was wrong for the applicant to say the decision of the first respondent was irrational as witnesses were not called for the applicant's allegation of breach of trust and misappropriation against the second respondent. The evidence before the first respondent was already sufficient in deciding that the second respondent had made out its claim. In any

event, the first respondent did not find that the applicant's allegation of breach of trust and misappropriation was proven. There was also no requirement for the first respondent to affirm an affidavit for the judicial review application. The decision of the first respondent was final and binding as stipulated in s. 120 of the SMA. Therefore, there was no reason to disturb the decision of the first respondent. (paras 21-24)

Case(s) referred to:

Bajaj Textiles Ltd v. Gian Singh & Company Ltd [1968] 1 LNS 11 FC ***(refd)***
Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation [2019] 2 CLJ 592 CA ***(foll)***
Government of Malaysia v. Mohamed Amin Hassan [1985] 1 LNS 79 FC ***(dist)***
Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn Bhd [2017] 4 CLJ 1 FC ***(dist)***
Malayan Banking Bhd v. Wembley Industries Holding Bhd [2012] 5 CLJ 956 HC ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(not foll)***
Perbadanan Pengurusan Megan Avenue 1 v. Harcharan S Sidhu & Anor [2017] 9 CLJ 563 HC ***(refd)***
Plaza 393 Management Corporation v. Ekuiti Setegap Sdn Bhd [2016] 1 LNS 1398 HC ***(refd)***
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] 1 CLJ (Rep) 56 PC ***(dist)***

Legislation referred to:

Limitation Act 1953, s. 6(1)(d)
Rules of Court 2012, O. 53
Strata Management Act 2013, ss. 105(2), 120, 121

For the applicant - Joshua Dharmaj & Sumathi Shanmugam; M/s Bell & Lee
For the 2nd respondent - Lee Kong Poh; M/s Lee Kong Poh & Assocs

Reported by S Barathi

JUDGMENT

Abu Bakar Jais J:

A man who pays his bills on time is soon forgotten – Oscar Wilde

Introduction

[1] This is an application for judicial review under O. 53 Rules of Court 2012 filed by the applicant against the decision made by the first respondent in favour of the second respondent.

[2] Having heard submissions, the application is refused and this written judgment provides the reasons for the decision.

Background Facts

[3] The applicant is a company. The first respondent is a tribunal established under the Strata Management Act 2013 ("SMA") and the second respondent is a management corporation incorporated under the Strata Titles Act 1985. It is the management corporation of a shopping complex in Seremban known as KM Plaza.

[4] The applicant is the legal owner of 134 parking lots at KM Plaza. The applicant sued the second respondent (together with other defendants) in a separate action at the High Court because the latter applied for strata titles thinking the applicant's parking lots were common property.

[5] The High Court gave judgment for the applicant and ordered damages to be assessed for the same. The assessment is still pending. This decision of the High Court is final as there was no appeal and thus there is nothing pending except the assessment.

[6] Subsequently, despite the High Court's decision, the second respondent filed action at the first respondent against the applicant. In this action, the second respondent claimed maintenance charges for the parking lots for 11 years, from 2004 to 2015. The applicant counterclaimed because the second respondent had wrongly rented out the parking lots of the former to others and wrongfully collected monies for the rentals.

[7] The first respondent decided in favour of the second respondent and dismissed the counterclaim of the applicant. Hence, the latter filed the present judicial review against that decision or award of the first respondent.

Summary Of The Applicant's Contentions

[8] The gist of the applicant's arguments in support of the judicial review is as follows:

(i) The decision of the first respondent as a tribunal is subject to judicial review of the High Court;

(ii) Judicial review against the first respondent includes challenging the substance of the decision itself and not only the decision making process of hearing;

(iii) The decision of the first respondent is wrong and invalid based on the Federal Court case of *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 on the grounds that it is illegal, irrational, procedurally improper and not proportionate;

(iv) It is illegal as the claim of second respondent is time-barred;

(v) It is illegal and procedurally improper as the decision of the first respondent for the second respondent contravened Limitation Act 1953 ("LA") on statutory time limitation to bring action and the provision of the SMA because the first respondent cannot act in contravention of the statutes;

(vi) It is also illegal and procedurally improper as the first respondent gave no reasons for its decision;

(vii) It is irrational as it is unreasonable because it ignored the applicant's defence and counterclaim without giving reasons;

(viii) It is also irrational as witnesses were not called for the applicant's allegation of breach of trust and misappropriation against the second respondent;

(ix) It is irrational as there are no grounds of decision for the applicant to know whether relevant factors have been taken into account and whether irrelevant factors have been left out;

(x) It is also illegal and procedurally improper for the second respondent to file action at the first respondent as the High Court had made a decision in favour of the applicant;

(xi) The first respondent ought to stay the action and refer the matter to the High Court pursuant to the provision of SMA;

(xii) The decision of the first respondent is also illegal as it contravened the principle of *sub-judice* as it should stay the proceedings for assessment of damages to be completed as ordered by the High Court;

(xiii) It is also illegal as the first respondent had shifted the burden of proof from the second respondent to the applicant in requiring the applicant to prove that the second respondent did not render maintenance services;

(xiv) There is no affidavit in rebuttal by the first respondent.

Summary Of The Second Respondent's Contentions

[9] In essence, the second respondent's submissions opposing the judicial review application is as follows;

(i) The decision of the first respondent is final and binding under the SMA;

(ii) Since it is final, the decision must be obeyed and can only be set aside if there is serious irregularity as required by SMA;

(iii) There is no serious irregularity in the decision;

(iv) The SMA provides the LA does not apply in the proceedings before the first respondent;

(v) On time limitation too, the applicant never disputed it has the obligation to pay the maintenance charges;

(vi) The applicant is obligated by statutes to make the payment;

(vii) As the debt of the applicant is based on "running account", time limitation does not apply;

(viii) There is no basis for the applicant to argue the first respondent did not provide its reasons for its decision as the same had complied with the relevant provision of the SMA;

(ix) In any event the first respondent did provide its reasons for the decision;

(x) The first respondent has the jurisdiction to make the decision;

(xi) The first respondent is in compliance with the law in the whole proceedings between the applicant and the first respondent;

(xii) The decision is a normal decision and there is nothing unreasonable about the same;

(xiii) The first respondent acted within jurisdiction as provided under the SMA;

(xiv) The applicant's counterclaim is not within the first respondent's jurisdiction.

Court's Findings

[10] Firstly, there is the need to determine the issue of whether the second respondent's claim at the first respondent is statute-barred by virtue of s. 6(1)(d) of the LA that only permits the recovery of the sum allegedly owed by the applicant up till six years from the cause of action.

[11] In this regard there is a Court of Appeal's decision very relevant on this issue. The case is *Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation* [2019] 2 CLJ 592; [2018] 4 MLJ 284. Tengku Maimun Tuan Mat JCA (as Her Ladyship then was) now FCJ in delivering the judgment first noted the decision of the High Court as follows:

> Under s 6(1) of the Limitation Act 1953, the action founded on contract shall not be brought after the expiration of six years from the date when the cause of action accrues. In this regard, the defendant submitted that the plaintiff was formed on 21 April 2008 whereas the plaintiff's claim was from 21 April 2008. The plaintiff's action filed on 15 March 2016 i.e after the expiration of six years from the date on which the cause of action accrued, is time-barred.
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> Relying on *Sri Wangsaria Management Corporation v. Yeap Swee Oo @ Yeap Guan Cheng & Anor*; *Veronica Leong Poh Geok v. Lim Cheng Poh* [2009] MLJU 1461; *Gulamabbas Mohamed Hussain v. Bonus Properties Sdn Bhd & Anor* [2015] MLJU 2046; [2015] 1 LNS 1073 and *Malayan Banking Bhd v. Wembley Industries Holdings Bhd* [2012] MLJU 91; [2012] 5 CLJ 956, the learned judge found that the plaintiff's statements of account are running accounts as whatever maintenance charges that were not paid by the

A defendant were carried forward by the plaintiff to the subsequent months. The plaintiff's claim is therefore not time-barred under the Limitation Act 1953.

Her Ladyship then explained the decision of the Court of Appeal as follows:

B Before we proceed with the main issues, we wish to state at the outset that we find no appealable error in respect of the learned judge's finding that the plaintiff's claim is based on a running account. In *Wembley Industries Holdings Bhd*, it was held:

> … a running account is a single account and not a composite of its various parts. A payment made on account of a running account C is in respect of the entire outstanding balance, with the result that time is extended for the whole of the debt.

It appears, therefore that a running account will become statute-barred only if more than six years has elapsed between the supply of the last article under it and the last payment on account.

D Consequently, we agree with the learned judge that the plaintiff's claim is not barred by limitation under s. 6 of the Limitation Act 1953.

[12] I am bound by the decision above. Likewise, I must also decide that the maintenance charges are running accounts and therefore not caught by s. 6(1)(d) of the LA.

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[13] Thus, it does not matter that s. 105(2) of SMA stipulates as follows:

> For avoidance of doubt, the Limitation Act 1953 shall not apply to the proceedings of the Tribunal.

[14] As the maintenance charges are not caught by s. 6(1)(d) of the LA F because the same are running accounts, there is no issue that s. 105(2) of SMA as shown above cannot be applied retrospectively and deprive the applicant's right which had purportedly accrued prior to that date by virtue of s. 6(1)(d) of the LA as mentioned earlier. Whether it cannot be applied retrospectively as contended by the applicant is not relevant because the G maintenance charges are not caught by that provision or any other provisions of the LA. Hence, the various cases quoted by the applicant including *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] 1 CLJ (Rep) 56; [1983] 1 MLJ 1, *Government of Malaysia v. Mohamed Amin Hassan* [1986] 1 MLJ 224 and *Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn* H *Bhd* [2017] 4 CLJ 1; [2017] 2 MLJ 697 are all not relevant because these cases did not deal with running accounts. More importantly, in citing these cases, with respect the applicant went off tangent in arguing any particular law cannot take away an accrued right. The fact is the provisions of the LA especially s. 6(1) LA simply do not apply for the applicant. Thus there is no I issue that a written law has taken away a right already given to the applicant.

[15] The applicant also failed to appreciate that it cannot seek refuge under s. 6(1)(d) of the LA to say that the second respondent's claim is time-barred because this statutory provision does not hinder or restrain a claim for running accounts for the maintenance charges. As such, the second respondent indeed can make the claim before the first respondent for these charges.

[16] Besides there are few other cases that support the contention that when it is a running account, the claim is not time-barred. (See *Perbadanan Pengurusan Megan Avenue 1 v. Harcharan S Sidhu & Anor* [2017] 9 CLJ 563; [2017] 11 MLJ 736, *Malayan Banking Bhd v. Wembley Industries Holding Bhd* [2012] 5 CLJ 956 and *Bajaj Textiles Ltd v. Gian Singh & Company Ltd* [1968] 1 LNS 11; [1968] 1 MLJ 279).

[17] Further, it is incorrect for the applicant to say that the second respondent had not pleaded the claim for running account. The whole of the second respondent's claim must be viewed to appreciate that this had indeed been pleaded. The same position is seen in *Plaza 393 Management Corporation v. Ekuiti Setegap Sdn Bhd* [2016] 1 LNS 1398; [2016] MLJU 1177 as follows:

> The Defendant submits that the Plaintiff did not plead specifically the running account and thus the Plaintiff is precluded from relying on it. I am of the view that despite the Plaintiff not pleading specifically its reliance on the running account, from a reading of the Plaintiff's pleadings as a whole, it is obvious that the Plaintiff's claim is based on not only current outstanding maintenance charges but also include whatever sums that were not paid, and have been carried forward to the Plaintiff's current SOA. In essence, it is clear that the Plaintiff's claim is based on a running account. Therefore, the Plaintiff is allowed to raise it and rely on the running account in the SOAs in its evidence and submissions.

[18] Next is the issue on whether the first respondent did provide reasons for its decision. The applicant's submission that the first respondent gave no reasons for its decision is plainly untrue because indeed the first respondent did provide the grounds of awards dated 21 August 2017. In it, the first respondent dealt with the issues before the same and explained the reasons in giving the award. This includes the applicant's allegation that the first respondent had wrongly shifted the burden of proof. There is no shifting of burden as the first respondent indeed had required the second respondent to prove the maintenance charges. In essence, there are no sufficient reasons for this court not to affirm that decision of the first respondent. This court should not be in the habit of overturning the decision of the inferior tribunal just because it has the power to review the same.

[19] Furthermore, even if there is a delay in giving the grounds of award, this does not mean it is produced as an afterthought. It is acceptable for the first respondent to reflect on the evidence, hear submissions, consider the same, deliver its decision and only then write the grounds of award.

Obviously time is needed in all these actions. Therefore the delay is expected. In any event, the delay is not too long. On the contrary, it would be much worse if the grounds of award by the first respondent is spontaneously or swiftly given, as it demonstrates that the same has the potential of not being a considered and reasoned decision.

[20] Also, the cases before the High Court and the first respondent were not the same. In the High Court, it was in respect of declaration and injunction regarding ownership of the parking lots. Before the first respondent, it was for the claim on failing to pay maintenance charges. Thus, the second respondent is not prohibited in making its claim before the first respondent despite the High Court pending assessment for damages for the applicant. The first respondent had no jurisdiction for the claim of the applicant at the High Court then but was well within jurisdiction for the second respondent's claim for maintenance charges. As such, the first respondent need not stay the proceeding for the assessment of damages to be completed at the High Court. There is nothing *sub-judice* in not staying the proceeding. Therefore, as the claims are entirely different, the argument of the applicant that s. 106 SMA had been infringed is with respect incorrect. The provision states as follows:

> (1) Where a claim is filed with the Tribunal and the claim is within the Tribunal's jurisdiction, the issues in dispute in that claim, whether as shown in the initial claim or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties in any court unless:
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> (a) the proceedings before the court were commenced before the claim was filed with the Tribunal; or
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> (b) the claim before the Tribunal is withdrawn, abandoned or struck out.
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> (2) Where paragraph (1)(a) applies, the issues in dispute in the claim to which those proceedings relate, whether as shown in the initial claim or emerging in the course of the hearing, shall not be the subject of proceedings between the same parties before the Tribunal unless the claim before the court is withdrawn, abandoned or struck out.

[21] It is also wrong for the applicant to say the decision of the first respondent is irrational as witnesses were not called for the applicant's allegation of breach of trust and misappropriation against the second respondent. The evidence before the first respondent was already sufficient in deciding the second respondent had made out its claim. The first respondent in any event did not find that the applicant's allegation of breach of trust and misappropriation was proven. The grounds of award showed at paras. 7 to 12 that the defence and counterclaim of the applicant had been considered. The applicant was also free to call witnesses, but failed to do so before the first respondent.

[22] Further, there is also no requirement for the first respondent to affirm an affidavit for this judicial review application. For those who are familiar with inferior tribunals upon which its decisions are challenged, the same is only named as a formal party to an action. It is similar to the Industrial Court's decisions. The Chairman of the Industrial Court does not file an affidavit-in-reply. Thus, the case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281 on the need for the first respondent to reply the affidavit as argued by the applicant is not applicable nor relevant.

[23] It is also to be noted that the decision of the first respondent is final and binding as stipulated in s. 120 of SMA that reads as follows:

> An award made under subsection 112(3) or section 117 shall:
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> (a) subject to section 121, be final and binding on all parties to the proceedings; and
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> (b) be deemed to be an order of a court and be enforced accordingly by any party to the proceedings.

And the decision of the first respondent can only be set aside if there is serious irregularity. This is said in s. 121 SMA as follows:

> A party to the proceedings of the Tribunal may, upon notice to the other party and to the Tribunal, apply to the High Court challenging an award in the proceedings on the ground of serious irregularity affecting the awards.

[24] There is no serious irregularity affecting the award because of the explanations on the facts and law as above. Therefore, there are no reasons to disturb the decision of the first respondent.

Conclusion

[25] Based on all the reasons explained, the judicial review application cannot be granted for the applicant. The applicant had failed to challenge the award handed by the first respondent. Hence, it is only right for the same to be dismissed.